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No. 81

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, *Appellant*,

v.

GEORGIA PUBLIC SERVICE COMMISSION, *Appellee*

On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

AUSTIN L. ROBERTS, JR.
Attorney for said Association
5310 I.C.C. Building
P. O. Box 684
Washington 4, D. C.

October 3, 1962

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PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the States

of the United States. The members of the Georgia Public Service Commission belong to the NARUC.

By the constitution of the NARUC its attorneys may be directed to appear in behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This brief is offered for filing on behalf of the NARUC by direction of its Executive Committee in the general public interest.

On March 1, 1962, the Executive Committee of the NARUC at a regular meeting duly adopted the following resolution:

> RESOLUTION REGARDING UNITED STATES V. GEORGIA PUBLIC SERVICE COMMISSION
>
> *Whereas*, The United States District Court for the Northern District of Georgia has upheld the right of the Georgia Public Service Commission to regulate tariffs charged by carriers within the State of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by agencies of the federal government (*United States* v. *Georgia PSC*, Civil Action No. 7528, October 2, 1961); and
>
> *Whereas*, Appeal from this judgment is being taken by the United States to the Supreme Court of the United States; now therefore, be it
>
> *Resolved*, By the Executive Committee of the National Association of Railroad and Utilities Commissioners that the legal representatives of the Association are hereby authorized to participate as appropriate in the aforesaid cause in support of the jurisdiction of the state commission to regulate the transportation in question.

The interest of the NARUC in this proceeding is on behalf of the state commissions and boards represented in the membership of the NARUC, which agencies are charged by state laws with the duty of regulating the intrastate rates and services of the motor carriers operating within their respective states so as to assure a healthy and adequate motor transportation system operating under just, reasonable, and non-discriminatory rates within their states.

STATEMENT OF THE CASE

The Georgia Public Service Commission, in the exercise of its regulatory jurisdiction over motor carriers of property operating within the State of Georgia, approved tariffs filed with the Commission prescribing the rates to be charged for the transportation of household goods and personal effects.

The General Services Administration, upon the request of the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, invited bids from carriers for the movement of household goods and personal effects of civilian employees of the Communicable Disease Center from Savannah, Georgia, to Atlanta, Georgia, and environs. Thirteen motor carriers submitted bids; eight quoting the just and reasonable rates as contained in the household goods tariff approved by the Georgia PSC, and five quoting rates cut below those contained in the approved tariff.

The General Services Administration awarded the contract to one of the motor carriers quoting cut rates. The Georgia PSC had a statutory duty to prevent discriminatory rates for intrastate shipments. The Commission therefore, advised the five carriers quoting cut

rates that, should they perform the transportation at rates quoted, they would be in violation of the Commission's rules and subject to having their operating authority revoked. The contracting carrier, subsequently, informed the General Services Administration that it would be unable to perform the services. The movement of the household goods was then procured by the government at the tariff rates filed and approved by the Georgia PSC.

Thereafter, the United States sued in the United States District Court for the Northern District of Georgia to prevent the Georgia PSC from regulating the tariffs charged by carriers operating within the State of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by government agencies. The District Court upheld the right of the Georgia PSC to regulate the tariffs under which Georgia carriers performed such transportation, and thereby its right to enforce the non-discriminatory provisions of the statute.

QUESTION PRESENTED

The question presented was lucidly spelt out by the District Court in its opinion:

> "It is also clear that short of state taxation of the national government or state regulation of the performance of federal officials and agencies of governmental functions, Ohio v. Thomas, 173 U.S. 276; Johnson v. Maryland, 254 U.S. 51; Hunt v. Washington, 278 U.S. 96; Arizona v. California, 283 U.S. 423, the states may, in the absence of Congressional enactment, adopt non-discriminatory taxing statutes, and non-discriminatory regulations, under the state's police power that may to some degree affect either the cost of

the government's operation within the state or increase difficulties touching on such operations. Alabama v. King & Boozer, 312 U.S. 1; United States v. Baltimore & Annapolis RR Co., 308 U.S. 525; Penn Dairies, Inc. et al. v. Milk Control Commission, supra (318 U.S. 261).

"The question we have here to decide, therefore, is whether the Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations."

STATEMENT OF POSITION

It is the position of the NARUC that the decision below should be affirmed.

ARGUMENT

I

Federal Procurement Practices v. National Transportation Policy

Over the last few years, there have been few subject matters which have received as much study as has the transportation system of our country. Such studies have been conducted by private groups, Congressional committees, Congressional study groups, and executive agencies among others.

Pursuant to Senate Resolutions 29, 151 and 244 of the 86th Congress, a Special Study Group on Transportation Policies in the United States prepared a report for the Senate Committee on Interstate and Foreign Commerce. This is the so-called Doyle Report, named after General John P. Doyle who was Staff Director of the Transportation Study Group. In the Committee Print, dated January 3, 1961, 87th Congress—1st Session, of this report, entitled

"National Transportation Policy", at pages 492, there is a discussion of the government as a purchaser of regulated transportation. The report reads:

> "As a purchaser of regulated transportation Government officials are, supposedly, bound by procurement regulations which apply to procurement generally and which require seeking the lowest price at which the commodity or service can be bought through competitive bidding. This fact is often stressed by Government agencies which desire to reduce their budgets at the expense of regulated carriers. Procurement regulations, however, were never designed to produce bargains for the Government but only to insure a just and reasonable price from unregulated competitors. In the presence of price regulation by a Government agency the bidding provisions of procurement regulations lose much of their meaning and should be inapplicable. The fact that much important procurement from unregulated sources has, for a variety of reasons, been exempted from bidding requirements lends support to the position that competitive bidding is certainly not necessary in addition to Government price regulation.
>
> "Furthermore, it is a stated policy of the Federal Government to promote healthy economic conditions among the regulated carriers. We must presume, in the absence of evidence to the contrary, that pricing approved by the regulatory agency is just and reasonable to carrier and user alike. If it is deemed otherwise, Government has the same recourse as any other user. In view of this fact it seems contrary to policy to provide a special avenue of price reduction to governmental agencies which is not available to nongovernmental users (who must share the burden of supporting the transportation system) and which is not subject to control by the regulatory agency.

> "Finally, in view of concepts of cost related pricing advocated elsewhere in this report, special reductions to governmental agencies not justified by cost considerations would represent an unsound deviation from an economic policy which should be equally applicable to all."

In December, 1960, the Honorable James M. Landis prepared a Report on Regulatory Agencies to the President-Elect. In a Committee Print of the report for the Senate Committee on the Judiciary, 86th Congress—2d Session, Dean Landis states, at page 25:

> ". . . Military transportation, as presently conducted, competes heavily with commercial transportation, and there are patent abuses that attach to the government as a mass shipper, but it still insists on going its own way regardless of the effects its policies may have upon other carriers."

On April 5, 1962, the President of the United States sent a message to Congress on "The Transportation System of Our Nation" (House Document No. 384, 87th Congress—2d Session). The President's message comments on the decline in the status and stature of common carrier transportation, and in its recommendations states:

> "The Federal Government is a major user of transportation services. To assure the greatest practical use of the transportation industry by Government, I am directing all agencies of the Government, in meeting their own transportation needs, to use authorized commercial facilities in all modes of transportation within the limits of economical and efficient operations and the requirements of military readiness." (p. 7)

These study reports on the Nation's transportation problems, uniformly criticise the transportation pro-

curement practices of the government as a shipper. The policies and recommendations expressed in these reports are consistent with the approach taken by the Georgia PSC in the instant case to providing at nondiscriminatory and known tariff rates transportation service for the movement of household goods.

The transportation procurement procedures manufactured by the government, ignoring all alternatives and contrary to the expressions of policy by the Executive and Legislative branches, have created an unnecessary conflict with the Georgia statutes. In such a situation, the expression of this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79, 83, seems applicable:

> ". . . absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

The conflict that exists between the Georgia statutes and the government's transportation procurement procedures are of the federal government's own making. If a genuine conflict exists, it is within the federal government itself, between its procurement procedures and the policy declarations of other branches and agencies of the government. With which must the State of Georgia be consistent?

The federal government should have as great, if not greater, interest in preserving an adequate system

of transportation and the national transportation policy as should commercial shippers and the state regulatory commissions. The practice of free or reduced rates for government transportation has met with considerable dissatisfaction because of the evils and abuses which it has created. (See *supra*, and also "A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization", April, 1955; "A Report to Congress by the Commission on Organization of the Executive Branch of the Government", March, 1955; "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense", March, 1955; Hearings on H. R. 525 before the House Committee on Interstate and Foreign Commerce—84th Congress, September 19-22, 1955; Hearings on S. 939 before the Senate Committee on Interstate and Foreign Commerce—85th Congress; and Hearings on H. R. 3233 before the House Committee on Interstate and Foreign Commerce—85th Congress.)

The House Committee on Interstate and Foreign Commerce has stated:

> "The committee is convinced that common carriers should no longer be permitted to grant rate and fare concessions to the United States, State, or municipal governments. This practice is discriminatory, wasteful, and contrary to the public interest." (House Report No. 2633 to accompany H. R. 525—84th Congress, p. 4)

These ill effects of free or reduced rates for the transportation of property for the United States must be weighed against any cost effect.

In addition, as stated in the President's Transportation Message, "Whatever the cause, the common carrier with his obligation to serve all shippers—large or small—on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished." (*Supra*; p. 3).

II

The Decision in California PUC v. United States Is Clearly Distinguishable

The whole thrust of Appellant's argument on the merits is that this case is controlled by the decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958). This should not be so and the two cases are clearly distinguishable.

In the *California PUC* case, it was held that a state could not prohibit carriers from transporting military traffic for the government at rates other than those approved by the state commission where the state policy of regulation of negotiated rates was in conflict with the federal policy of unregulated negotiated rates.

(1) The *California PUC* case dealt with military traffic and the requirements of national defense for the expeditious shipment of such traffic. The last paragraph of the Court's decision quoted General Lasher: "for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war."

The instant case relates to the Communicable Disease Center of the U. S. Department of Public Health.

There is no demonstrated relation between this agency and the needs of the military and national defense as existed in the *California PUC* case.

(2) The *California PUC* case involved transportation of military property of the United States. The instant case relates to transportation of household goods of civilian employees of the government. In the California situation the government itself needed to arrange for the transportation. In the instant situation the government has the alternative of allowing the employee to contract for the movement of his own household goods with the government remunerating the employee for his expense.

(3) In the *California PUC* case, the state policy was to require approval of the negotiated rates. This could cause delay and could give the state agency veto power over the negotiated contract.

In the instant case, the state policy does not provide for review of negotiated rates but requires non-discriminatory compliance with the filed tariff rates. The filed tariff rates are known—there is no delay. There would be no necessity for commission procedures seeking approval where the contract rates were the tariff rates.

(4) In the *California PUC* case, it would have been necessary for the military to classify thousands of different items to comply with published tariffs and classifications or else to seek "freight-all-kinds" rates in order to procure transportation.

In the instant situation, there is no need to classify items or seek new classifications, as the tariffs for household goods and personal property are already

filed and that category of transportation movement already classified.

(5) In the *California PUC* case, the challenge went to the statute which required submission to the state commission of negotiated-rate contracts.

In the instant situation, the challenge in essence goes to the state commission's rate order—to the level of rates for movement of household goods. It does not go to the procedures of the commission in approving the rates. If the government feels the level of the tariff rates are too high, it is empowered by the Administrative Services Act of 1949 (40 U.S.C. Sec. 481 (a) (4)) to represent federal agencies "in proceedings involving carriers or other public utilities before Federal and State regulatory bodies."

In short, the situation in the *California PUC* case was materially different from the instant situation, and the need and reasons for the conclusion reached in the *California PUC* case are not applicable to and should not be controlling of the instant case.

III

The District Court's Conclusion That the Instant Case Is Analogous to Penn Dairies v. Milk Control Commission Is Sound

The Georgia PSC places its chief reliance on the decision in *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261. In the *Penn Dairies* case, it was held that a state law regulating milk prices was not, as applied to contracts for sale of milk to the Federal government, in conflict with or rendered invalid by Federal procurement statutes requiring competitive bidding. This Court stated therein:

"As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. G.A.F. Seelig, Inc., 294 US 511, 97 L ed 1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, 314 US 1, 86 L ed 3, 62 S Ct 43, 140 ALR 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A.R. Co. v. Lichtenberg, 176 Md 383, 4A(2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in James Stewart & Co. v. Sadrakula, 309 US 94, 84 L ed 596, 60 Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on

> the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v. Mitchell, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York, 306 US 466, 483, 487, 83 L ed 927, 934, 937, 59 S Ct 595, 120 ALR 1466."

In *California PUC* the Court distinguished the *Penn Dairies* case in the following language:

> "There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id. 318 U.S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear."

As pointed out above, however, the instant case does not involve a state policy of regulation of negotiated rates. It involves a state policy of a fixed, known and non-discriminatory tariff rate. The instant case is not distinguishable from *Penn Dairies* by the criteria set forth in the *California PUC* case.

The instant case is much more analogous to the *Penn Dairies* situation where the state policy was one "fixing the price."

As the lower court concluded:

> "Since the shipment of household goods by the United States does not present the unique and difficult problems encountered when military supplies are involved, it appears that the case before us has more in common with Penn Dairies than with California Commission v. United States. This being so, we must conclude that Penn Dairies controls our determination of the issue here."

CONCLUSION

It is respectfully submitted that the decision below was sound and should be affirmed.

Respectfully submitted,

AUSTIN L. ROBERTS, JR.
Attorney for the
National Association of
Railroad and Utilities
Commissioners,
amicus curiae

October 3, 1962